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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REGINO MARTIN ESPINO,

Appellant,

vs.

OCEAN CARGO LINE, LTD.,
etc., et al.,

Appellees.

APPELLANT'S REPLY BRIEF

NOV 4 1966

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

MARGOLIS and McTERNAN

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RESPONDENT'S EXCEPTION COULD NOT
BE TREATED AS A MOTION FOR SUM-
MARY JUDGMENT UNDER ADMIRALTY
RULES

Respondent urges in its brief that an exception to a libel,
accompanied by affidavits, may be considered as a motion for
summary judgment under Admiralty Rule 58. In setting forth this
argument, respondent conveniently ignores the requirements of
Rule 58, to wit:

"Rule 58. Summary Judgment . . .

"(e) Form of affidavits - Further testimony -

Supporting and opposing affidavits shall be made on

personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . ."

The affidavit filed by respondent herein was not made on personal knowledge and did not show affirmatively that the affiant was competent to testify to the matters stated therein. Furthermore, all of the material contained in the affidavit relative to prejudice was hearsay and would have been inadmissible in evidence (C. 18-25). The cases cited by respondent in support of the proposition that a Court may consider a motion to dismiss accompanied by affidavits as being in the nature of a motion for summary judgment make it abundantly clear that the requirements of Admiralty Rule 58 and Civil Rule 56 must be strictly followed as a prerequisite to entry of judgment. (See, for example, Mantin v. Broadcast Music, Inc., 248 F.2d 530, 532 (9th Cir. 1957).)

Without the benefit of Rule 58, the use of an affidavit by respondent was clearly unauthorized. In Westful Larsen v. Allman Hubble Tugboat Co., 73 F.2d 200 (9th Cir. 1934), cited by respondent as authority for the proposition that exceptions addressed to the question of laches may be decided on the basis of affidavits or exceptive allegations, no affidavits were involved. Rather, appellee in the Westful case had submitted "exceptive allegations" in response to a libel in which appellant had given no reason for a delay and facts showing laches appeared on the face of the appellant's

pleadings. No additional facts were alleged in the exceptive allegations relative to laches. By way of contrast, respondent herein has attempted to meet appellant's assertion of lack of prejudice by way of an affidavit containing information not disclosed on the face of the libel and not within the personal knowledge of the affiant. Thus, respondent's exception fails if treated as analogous to a demurrer because it requires the Court to look outside the pleadings for information to sustain the exception and it fails if treated as analogous to a motion for summary judgment because the affidavit does not conform to the requirements of Admiralty Rule 58.

Disregarding the affidavits filed by respondent, the exception should not have been sustained. Appellant's libel contained allegations asserting excusable delay and lack of prejudice to respondent - nothing further was required to overcome an exception based on laches.

CONCLUSION

WHEREFORE, for all of the reasons and considerations above stated and those expressed in Appellant's Opening Brief, it is respectfully submitted the judgment below should be reversed and the cause reinstated for trial.

Respectfully submitted,

MARGOLIS and McTERNAN

By: WILLIAM G. SMITH

Attorneys for Appellant

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ William G. Smith

WILLIAM G. SMITH

